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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

THOMAS RICHARD WALKER
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Thomas Richard Walker, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on November 8, 1973.

CITATIONS TO OPINIONS BELOW

The opinions below are unreported. The Court of Appeals Judgment, per curiam, dated November 8, 1973, is printed in Appendix A, at page 1a. The Order denying rehearing is printed in Appendix A, at page 2a.

JURISDICTION

The judgment of the Circuit Court of Appeals, affirming the judgment of the District Court, was entered on November 8, 1973. Rehearing was timely sought, but denied, on December 11, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

May a Federal District Court ignore the mandate of Rule 11, Federal Rules of Criminal Procedure, including the clear instructions from this Court, and accept a plea of guilty *without* developing at any time in any way a factual basis for the plea?

RULE OF PROCEDURE INVOLVED

This matter is concerned with Rule 11, Federal Rules of Criminal Procedure. The full text of the Rule states:

> RULE 11. Pleas
>
> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is factual basis for the plea.
>
> As amended Feb. 28, 1966, eff. July 1, 1966.

STATEMENT

Petitioner Thomas Richard Walker, who resides in the Detroit, Michigan area, and another, one Kim Bridenstine, were indicted by a Federal Grand Jury for the Laredo Division of the Southern District of Texas. The indictment was in three counts. The first charged conspiracy to possess with intent to distribute a quantity of marihuana. The second and third counts involved the substantive crimes of possession and importing that marihuana. (The indictment is set out in Appendix B, pages 2a, 3a, 4a).

On February 27, 1973, petitioner Walker (and Bridenstine) appeared for arraignment with local counsel of their own choosing. With their counsel, both had previously bargained for pleas of guilty to Count I (conspiracy) of the Indictment with the U. S. Attorney.

At the arraignment, the conspiracy count only of the Indictment was read and the petitioner was asked to plead, "guilty or not guilty". He thereupon, and in keeping with the "plea bargaining", said he was "guilty". (Appendix C, pages 4a, 5a, 6a, 7a).

The District Judge asked if Petitioner knew that the maximum penalty provided for violation of a conspiracy charge was a five year jail term, plus fine. Petitioner asknowledged both orally and in writing that he was aware of that fact. The Judge also said:

> "... the allegations made against you here, which you are undertaking to admit by your plea of guilty, the allegations are these: that the two of you agreed to violate the law by possessing with the intent to distribute it to other persons a quantity of marihuana, that thereafter one or both of you did something, committed some act designed to carry out that plan, that this was all done unlawfully, know-

ingly and intentionally. Is that true?" (Appendix C, page 5a).

To which inquiry, the petitioner answered, "Yes Sir."

This plea was accepted by the Court. With no further attempt to spread the factual basis for the plea on the record, the Court imposed sentence on petitioner.

After he was sentenced, petitioner obtained new counsel, who, on his behalf made an oral motion to set aside his plea. This was denied. The acceptance of the plea and the sentence were thereafter appealed to the Fifth Circuit Court of Appeals.

The Appellate Court, without hearing oral argument, filed its one-word, unreported, per curiam opinion, affirming the action of the District Court. Rehearing was timely sought and that too, denied. (The full "opinion" and deniel of rehearing are set out at Appendix A, page 2a).

Both in his Brief on Appeal and in his Petition for Rehearing, petitioner sought to set aside his guilty plea on the ground that no factual basis appeared in the record; that the plea was thus improperly accepted. No reason has been given by the Courts below excusing the procedural requirement that the factual basis for the plea must appear. At no time has petitioner been advised why the procedure established by this Court in *McCarthy* v *U.S.* 394 US 459, can be ignored.

REASONS FOR GRANTING THE WRIT

1. It is imperative that this writ be granted because the Court below has sanctioned a gross departure from the usual and accepted course of judical proceedings. The supervisory power of this Court should be exercised to correct the manifest procedural error below.

Petitioner offered a plea of guilty to one of the counts in the Indictment. Rule 11, Federal Rules of Criminal Procedure provides, in pertinent part:

> "The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

In *McCarthy* v *U.S.*, supra, this Court directed the District Courts, when receiving a guilty plea, to develop *on the record* the factual basis of the plea.

Since 1971, the Federal trial courts have had a clear and succint procedural guideline:

> "Fed Rule Crim Proc II governing pleas in federal courts now makes clear that the sentencing judge must develop *on the record,* the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." (Emphasis in original) *Santobello* v *New York,* 404 US 257 @ 261

At no time did the District Judge ask petitioner about such of his actions which would provide a basis for the crime charged. At no time did the District Judge develop from any source whatsoever, the facts which supposedly provided a basis for the charge against petitioner.[1] The Procedural Rule and the directions of this Court were uniformly ignored in the acceptance of petitioner's plea and entry of judgment against him.

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[1]Had the Court in fact asked petitioner, or the government agents about such facts, petitioner could not have supplied enough to show he had participated in the alleged conspiracy. For in fact, petitioner had not conspired. We see here one of the problems which are inherent in the "plea bargaining" procedure, especially when more than one defendant is involved. The net of "conspiracy" can drag in many innocent parties. Then, the "plea bargaining" is done on a joint—not an individual basis. Options are opened only on a mutual basis. It becomes virtually impossible, in some circumstances, to make an individual decision considering only individual circumstances.

When such a plain and obvious departure from the standard of procedure is permitted, both the Bench and the Bar should have the benefit of knowing why the departure was allowed. The Court of Appeals, by placing this appeal on its Summary Docket[2], and by affirming without opinion or reason the action of the District Court, has prevented us from knowing what circumstances, in its judgment, permit the relaxation of what is otherwise a clear and express procedural requirement.[3]

Since the District Court has failed to follow the mandatory procedural requirements of the Rules of Procedure and of this Court's directions, and since the Circuit Court has affirmed that action, without explanation, it is respectfully requested that this Court exercise its supervisory power in such cases and either hear petitioner on the merits of his claim, or in the alternative, direct that the matter be remanded to the District Court for re-arraignment and plea. For a fact, petitioner would plead "not guilty"—as there is no basis for him to do otherwise.

2. The writ should be granted so that the duty of the lower courts to follow the clearly set forth practice requirements of Rule 11, Federal Criminal Rules, be established. If, on the other hand, there are exigent reasons for abandoning those clear requirements in particular cases, the limits of discretion should be spelled out.

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[2]Rule 18 of the Rules of the Fifth Circuit permit that Court to assign cases, in its discretion, to its "Summary Docket". On that docket, cases are heard and decided on written briefs, no oral argument is permitted.

[3]Petitioner timely filed a petition for rehearing with the Circuit Court asking, among other things, to know *why* his appeal was rejected—if the Court persisted in affirming the District Court's action. The Petition for Rehearing was denied without any reason given.

Although we are hampered somewhat by a failure of the Court of Appeals to file an Opinion supporting its decision, and by the further failure of that Court to set out the circumstances which led to petitioner's appeal to that Court, there is no dispute about the facts. Plainly and simply stated *there is absolutely no showing of any fact anywhere on any record which in any way provides any basis for petitioner's plea of guilty.*

As we have pointed out above, up to now, Rule 11 has unequivocally required that a factual basis for the plea of guilty *must* be spread upon the record. Up to now, failure to scrupulously follow the Rule's requirement has meant "automatic prejudice". This Court held in summarizing its holding in *McCarthy:*

> "We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the Defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea." 394 US 459, @ 471, 472.

Obviously, since the District Court did not make the record which has been held to be mandatory in a Rule 11 hearing, and since prejudice is inherent in a case of noncompliance, there must have been some reason which persuaded the Court of Appeals that "scrupulous compliance by the District Court" was not required in this case. Those reasons have not been recited by any Court, so far as we are aware. The only such reason which could possibly have affected the outcome of this cause is the fact that the plea here was tendered as the result of "plea bargaining".

If "plea bargaining" is to be a reason for avoiding the

directives of Rule 11, this Court should be the forum to so indicate. If there is any other reason for avoiding "scrupulous compliance", this Court should announce such a deviation. As this matter now stands, there is the deviation from "scrupulous compliance", but no justification is given therefor. We should know if the Rules of Criminal Procedure, and particularly Rule 11, are to be the same, and uniformly followed throughout the many District Courts, or if there are areas of discretion which may be exercised by Trial Courts in various parts of the Federal system.

CONCLUSION

An overwhelming precentage of convictions in United States District Courts are as the result of pleas of guilty. Rule 11 of the Criminal Rules provides for the acceptance of such pleas and the passing of judgment thereon only after a factual basis for the plea has been demonstrated. This Court has decreed that such demonstration of facts must appear in the record at the time the plea is entered. And it has further held that scrupulous compliance with Rule 11 is required to avoid inherent prejudice to a criminal defendant.

Scrupulous compliance with Rule 11 was avoided by the District Court for the Southern District of Texas. The failure of that Court to comply with the Rule was sanctioned by the Court of Appeals for the Fifth District.

The petition for writ of certiorari should be granted in this case to correct the sanctioned departure by the lower court from accepted and usual course of judical proceeding.

Respectfully submitted,
DONALD F. WELDAY, JR.
SANFORD ROSENTHAL
Co-counsel for petitioner

Dated: January 10, 1974.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2159

Summary Calendar*

UNITED STATES OF AMERICA
Plaintiff-Appellee,

versus

KIM CRAWFORD BRIDENSTINE and
THOMAS RICHARD WALKER,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

(November 8, 1973)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.¶

*Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir 1970, 431 F. 2d 409, Part I.

¶*See* N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F. 2d 966.

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(Title of Court and Cause)

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 8, 1973

Issued as Mandate:

(Title of Court and Cause)

ON PETITION FOR REHEARING
(December 11, 1973)

Before WISDOW, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX B

INDICTMENT

The Grand Jury Charges:

Count One

That within the five years, last past in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, Kim Crawford Bridenstine and Thomas Richard Walker, hereinafter called conspirators, did knowingly and wilfully combine, conspire, confederate and agree together, and each with the other, and with other persons to the Grand Jurors unknown, to commit the following offense against the laws of the United States of America, to-wit:

To unlawfully, knowingly, and intentionally possess with intent to distribute a constrolled substance under Schedule I of the Controlled Substances Act, to-wit: a quantity of Marihuana (Cannabis Sativa), in violation of Title 21, United States Code, Section 841 (a) (1).

That pursuant to and for the purpose of carrying out the said combination, confederation, conspiracy and agreement, and to effectuate the objects thereof, the following overt acts were committed within the Laredo Division of the Southern District of Texas and elsewhere:

Overt Acts

1. On or about November 21, 1972, Thomas Richard Walker travelled in Hebbronville, Texas.

2. On or about November 21, 1972, Kim Crawford Bridenstine travelled near Hebbronville, Texas.

3. On or about November 21, 1972, Kim Crawford Bridenstine transported a quantity of Marihuana.

(Violation: Title 21, United States Code, Section 831 (a) (1) and 846)

Count Two

That on or about November 21, 1972, within the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, Kim Crawford Bridenstine and Thomas Richard Walker did unlawfully, knowingly, and intentionally possess with intent to distribute a controlled substance under Schedule I of the Controlled Substances Act, to-wit: approximately Two Hundred Thirty-eight (238) pounds of Marihuana (Cannabis Sativa).

(Violation: Title 21, United States Code, Section 841 (a) (1) and Title 18, United States Code, Section 2.)

Count Three

That on or about November 21, 1972, within the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, Kim Crawford Bridenstine and Thomas Richard Walker did unlawfully, knowingly, and intentionally import into the United States from the Republic of Mexico a controlled substance under Schedule I of the Controlled Substances Act, to-wit: approximately Two Hundred Thirty-eight (238) pounds of Marihuana (Cannabis Sativa). (Violation: Title 21, United States Code, Sections 952 (a) and 960 (a) (1) and Title 18, United States Code, Section 2.)

A True Bill:

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Foreman of the Grand Jury

Anthony J. P. Farris
United States Attorney
By Daniel V. Alfaro
Assistant United States Attorney

APPENDIX C

TRANSCRIPT OF HEARING

(1) (United States District Court—
Southern District of Texas)

Before: Honorable Ben C. Connally, Chief District Judge.

Laredo, Texas
February 27, 1973
April 23, 1973

Appearances: Anthony J. P. Farris, Esq., United States Attorney. By: Daniel Alfaro, Esq., Assistant United

States Attorney, for the Government. Joe B. Evans, Esq., and Abraham Kazen, III, Esq., for the Defendants.

(2) (February 27, 1973, all Defendants and Counsel Present in Open Court)

The Court: Criminal Action 73-L-71, United States against Kim Crawford Bridenstine and Thomas Richard Walker; Mr. Evans of Counsel.

Mr. Kazen: I will be Mr. Evans' local counsel, your Honor.

The Court: You are Mr. Bridenstine and you are Mr. Walker. You may arraign them.

(Count One of the Indictment read)

Mr. Alfaro: To Count One of this Indictment, Kim Crawford Bridenstine, how do you plead, guilty or not guilty?

Defendant Bridenstine: Guilty.

Mr. Alfaro: To Count One of this Indictment, Thomas Richard Walker, how do you plead, guilty or not guilty?

Defendant Walker: Guilty.

The Court: Both you young men are entering the plea of guilty because in fact you are guilty of the offense charged?

Defendant Bridenstine: Yes, sir.

Defendant Walker: Yes, sir.

The Court: You understand what you are alleged to have done here?

(3) Defendant Bridenstine: Yes, sir.

Defendant Walker: Yes, sir.

The Court: It is charged here that this was a conspiracy, an agreement between two or more persons to violate the law followed by an overt act committed in this District designed to carry out the unlawful agreement. Thus the

allegations made against you here, which you are undertaking to admit by your plea of guilty, the allegations are these: that the two of you agreed to violate the law by possessing with the intent to distribute it to other persons a quantity of marijuana, that thereafter one or both of you did something, committed some act designed to carry out that plan, that this was all done unlawfully, knowingly and intentionally. Is that true?

Defendant Bridenstine: Yes, sir.

Defendant Walker: Yes, sir.

The Court: You must understand, too, that this is a serious violation, a felony, the maximum sentence which the Court might impose is the same in a conspiracy charge as for the substantive count, that is a five-year period of confinement, a special parole term of not less than two years, and a fine of fifteen thousand dollars. You are aware of that?

Defendant Bridenstine: Yes, your Honor.

Defendant Walker: Yes, sir.

(4) The Court: You have had ample time to discuss it with your lawyers and get the benefit of their help and advice?

Defendant Bridenstine: Yes, sir.

Defendant Walker: Yes, sir.

The Court: Read over these two forms and if true sign them, and if not, tell me so.

(Subscribed and sworn to.)

The Court: A pre-sentence as to these to young men, please.

Mr. Evans: May I address the Court: My clients are from Michigan, and I would like to have some additional time insofar as assisting the probation officer in the preparation of the pre-sentence investigation, and I don't know

what the court's procedure is as to when the sentencing date would occur.

The Court: Five or six weeks from now.

Mr. Evans: That would be fine.

The Court: You young men are both from Michigan?

Defendant Bridenstine: Yes, sir.

The Court: How old are you, Mr. Bridenstine?

Defendant Bridenstine: I am 24.

The Court: Go to school or did you finish school?

(5) Defendant Bridenstine: I am just in the process of going back into school.

The Court: Have you been working, had a job?

Defendant Bridenstine: Yes, sir.

The Court: Doing what?

Defendant Bridenstine: I am a die maker.

The Court: Married or single?

Defendant Bridenstine: I am single.

The Court: Mr. Walker, how old are you, sir?

Defendant Walker: Twenty-three, your Honor.

The Court: Do you live in Michigan?

Defendant Walker: Yes, sir.

The Court: Where?

Defendant Walker: Inkster, Michigan. It is outside of Detroit.

The Court: Are you in school or have you finished?

Defendant Walker: I have completed two years of college and I am not in school right now at the present time.

The Court: Single?

Defendant Walker: Yes, sir.

The Court: Either one of you been in (6) trouble before?

Defendant Bridenstine: No, sir.

Defendant Walker: No, sir.

The Court: Let's see, You are both on bond. We will send you a notice when to be back down here. Please don't fail to appear when we need you. A pre-sentence. That's all for now.

Defendant Bridenstine: Thank you, your Honor.

(April 23, 1973, all Defendants and Counsel Present in Open Court)

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1085

THOMAS RICHARD WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his guilty plea was accepted without an adequate factual basis, in violation of Rule 11, Fed. R. Crim. P.

A three-count indictment filed in the United States District Court for the Southern District of Texas charged petitioner and Kim Crawford Bridenstine with importation of marihuana, possession of marihuana with intent to distribute, and conspiracy to possess, in violation of 21 U.S.C. 841, 846 and 960. At a hearing on February 27, 1973, petitioner and Bridenstine withdrew their pleas of not guilty to the conspiracy count and entered pleas of guilty. Before accepting the pleas, the district court inquired into whether the pleas were voluntary and knowing. The court asked whether it was true that the two of you agreed to violate the law by possessing with the intent to distribute it to other persons a

quantity of marihuana, that thereafter one or both of you did something, committed some act designed to carry out that plan, that this was all done unlawfully, knowingly and intentionally." (Pet. App. 6a, Tr. 3).[1] Petitioner replied, "Yes, sir." Following additional inquiry, retained defense counsel advised the court that his clients were from Michigan and asked for time to assist the probation officer in the preparation of the pre-sentence reports. The court granted the request (Tr. 4).

On April 23, 1973, petitioner and co-defendant Bridenstine appeared for sentencing. The court began the hearing by remarking that petitioners had entered pleas of guilty to a charge that they had conspired to possess 230 pounds of marihuana with intent to distribute (Tr. 6). Both defendants exercised their right to allocution, admitting that their conduct was the result of "thoughtlessness" and "stupidity" (Tr. 9). Defense counsel remarked that he had filed certain reports on behalf of his clients for the court to examine in addition to the presentence report. Counsel urged a sentence of probation in light of petitioner's age (23) and absence of a criminal record, terming his criminal activity an immature attempt "to make some fast money" (Tr. 9-10). The court rejected counsel's suggestion and imposed a sentence of three years' imprisonment, two years of special parole and a $500 fine. The court of appeals affirmed (Pet. App. 1a-2a; 485 F. 2d 686).

Petitioner contends that the record fails to show an adequate factual basis for acceptance of the plea, as

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[1]We are lodging with the Clerk of this Court the transcript of the hearings at which petitioner pleaded guilty and was sentenced ("Tr.").

required by Rule 11, Fed. R. Crim. P.[2] He states that if he had been asked personally about the underlying facts, he could not have furnished sufficient proof to establish the existence of a conspiracy, for in fact he had not conspired (Pet. 5). Petitioner's assertion evidently presupposes that the court must ascertain the factual basis before the plea is accepted, solely by questioning the entrant of the guilty plea. Petitioner misinterprets Rule 11. The report of the Advisory Committee on the 1966 Amendments, Rule 11, states that a factual basis can be obtained from any source, including prosecution and defnese counsel, a presentence report, "or otherwise." The record shows that prior to imposing sentence (and entering judgment) the district judge had a presentence report. Moreover, the court's inquiry at the time of plea, although tracking the language of the indictment, was sufficiently specific to indicate that petitioner's conduct constituted the offense charged. *Jimenez* v. *United States*, 487 F. 2d 212 (C.A. 5), certiorari denied as untimely filed, No. 73-6252, April 1, 1974. The court elicited a specific admission that an agreement was made to violate the law by possessing marijuana (Tr. 3). Accordingly, the court complied with Rule 11 before entering judgment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[2]Rule 11 provides in pertinent part: "The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

DOJ-1974-04